

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JUL 8 1998

PATRICK FISHER
Clerk

PAUL SENA,

Petitioner - Appellant,

v.

RONALD L. LYTLE; ATTORNEY
GENERAL STATE OF NEW
MEXICO,

Respondents - Appellees.

No. 98-2050

(D. New Mexico)

(D.C. No. CIV-97-101-BB/WWD)

ORDER AND JUDGMENT*

Before **ANDERSON, McKAY**, and **LUCERO**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Paul Sena seeks a certificate of appealability, see 28 U.S.C. § 2253(c), that would enable him to appeal the denial of his 28 U.S.C. § 2254 habeas petition, in which he sought relief from his New Mexico convictions for second degree murder and aggravated assault. We deny the certificate of appealability and dismiss the appeal.

A New Mexico grand jury issued a three-count indictment against Mr. Sena, charging him with first degree murder with a firearm enhancement and attempted first degree murder with a firearm enhancement, in violation of N.M. Stat. Ann. §§ 30-2-1A(1), 30-2-1A(2) and 31-18-16, and tampering with evidence, in violation of N.M. Stat. Ann. § 30-22-5. Pursuant to a plea agreement, Mr. Sena pleaded guilty to second degree murder and aggravated assault. He was sentenced to nine years for the second degree murder conviction, one and one-half years for the aggravated assault conviction, and one year each for the firearm enhancements, all to run consecutively. The court suspended one year of the sentence, resulting in a total sentence of eleven and one-half years, followed by two years of parole.

After exhausting state remedies, Mr. Sena brought this habeas action, alleging (1) that his guilty plea “violated due process because it had no factual basis and that the plea was invalid due to ineffective assistance of counsel because defense counsel had unreasonably failed to discover and inform him that

there was no factual basis for his plea,” Appellant’s Br. at 9; (2) that a violation of due process and double jeopardy occurred when each count was enhanced by the use of the same firearm; and (3) that the imposition of consecutive sentences violated due process. The magistrate judge examined the merits of those arguments and rejected them. The district court adopted the magistrate judge’s recommendation and dismissed the petition with prejudice.

Mr. Sena makes the identical three arguments in this appeal. To obtain a certificate of appealability, a petitioner must make a substantial showing of the denial of a federal right. See Nguyen v. Reynolds, 131 F.3d 1340, 1345 (10th Cir. 1997). After careful consideration of the record and the parties’ arguments, we DENY Mr. Sena’s application for a certificate of appealability for substantially the reasons stated by the magistrate judge in his report and recommendation, dated November 25, 1997, and adopted by the district court on January 21, 1998. We therefore DISMISS this appeal.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge